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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAVE THE VALLEY, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN L. OBERDORFER
J. GORDON ARBUCKLE
DUANE A. SILER
RUSSELL V. RANDLE

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Attorneys for Petitioner
Save The Valley, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

May the court of appeals, without explanation, deny all attorney's fees sought under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), where the party seeking such fees achieved, through litigation against the Environmental Protection Agency, modifications to a permit for an electric power plant which protect the air and ground water better than the challenged permit would have.

PARTIES

The parties involved in this attorney's fees litigation are Save The Valley, Inc. (STV) an environmental group organized as an Indiana non-profit corporation, and the Environmental Protection Agency (EPA). Louisville Gas & Electric (LG&E), intervenor below, was not involved in the dispute over attorney's fees.

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ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Save The Valley, Inc. (STV), an environmental group with several hundred members in Indiana, Kentucky, and Ohio, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals denied petitioner's motion for attorney's fees and costs in an unreported order and issued no opinion on that aspect of the case. Two earlier orders of the court of appeals are unreported (Appendix, *infra*, 2a, 4a), as is the opinion of the Administrative Law Judge modifying the challenged water pollution discharge permit.

JURISDICTION

The judgment order of the court of appeals was entered on July 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. III 1979), provides in relevant part as follows:

> In any judicial proceeding under this section the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

STATEMENT OF THE CASE

This case arises from a dispute about the environmental requirements to be imposed on a proposed coal-fired power plant. Petitioner litigated the substantive and procedural validity of the Environmental Protection Agency's decisons to grant air and water pollution discharge permits to the plant, and eventually obtained an order causing EPA to modify the water pollution discharge permit in order to protect air quality from periodic breakdowns of the plant's air pollution control equipment, and ground water quality from the improper disposal of sludge from that equipment.

On the basis of this partial but tangible success, petitioner moved for attorney's fees and costs pursuant to section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. III 1979). The court of appeals denied the motion in a two-sentence order. A brief description of the merits of the litigation will place that denial in context.

1. In 1975, Louisville Gas & Electric (LG&E) began to seek various environmental and other permits necessary to construct a large coal-fired electric power plant along the Ohio River in Trimble County, Kentucky.

LG&E sought two permits from EPA, one for a National Pollutant Discharge Elimination System (NPDES) permit pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342 (1976 ed.), and the second for a Prevention of Significant Deterioration (PSD) permit pursuant to the Clean Air Act and then-applicable EPA regulations. EPA was required to prepare a comprehensive environmental impact statement (EIS) pursuant to section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1976 ed.), and section 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c), (1976 ed.), as part of its decisionmaking process on the NPDES permit application.

LG&E proposed to use flue gas desulfurization scrubbers in order to meet air pollution control requirements. This choice of control equipment raised concerns about air pollution during periodic scrubber breakdowns, breakdowns which EPA permitting officials considered "inevitable." This choice also raised questions about ground water pollution from on-site scrubber sludge disposal in an area noted for sinkholes and dependent on local wells for drinking water. EPA initially proposed to include a PSD permit condition requiring maintenance of a 30-day supply of low-sulfur coal for use during scrubber malfunctions, and an NPDES permit condition requiring the monitoring of ground water quality and a conversion to off-site sludge disposal in the event ground water contamination were detected.

The final PSD and NPDES permits contained neither condition. Instead, EPA chose to include a "stipulation" in the Final EIS Appendix, whereby LG&E purported to bind itself to such conditions. Petitioner objected to these and other aspects of the permits and impact statement, contending, *inter alia*, that the stipulation was unenforceable, and that EPA's reliance on it rendered the EIS and permits invalid.

2. STV filed this action in the court of appeals on January 17, 1979, pursuant to section 307 of the Clean

Air Act, 42 U.S.C. § 7607, and section 509 of the Clean Water Act, 33 U.S.C. § 1369 (1976 ed.), and challenged the validity of the PSD and NPDES permits. STV contended that the NPDES permit was invalid because (1) EPA had denied STV's request for an adjudicatory hearing to consider the adequacy of the EIS on which the permit decision was based, and (2) because the EIS was legally insufficient in its consideration of important clean air issues, including the enforceability of the "stipulation," and the failure to conduct modeling of the plant's effects on overall air pollution in the Ohio River Valley and on acid rain. STV also contended that the PSD permit was invalid because EPA did not provide an opportunity for comment on the final permit.

Following LG&E's intervention, the parties attempted to settle the case, and to that end, STV and LG&E submitted lengthy briefs to EPA's General Counsel on the issue of STV's right under EPA regulations to an adjudiciary hearing on the NPDES permit. In August 1979, the General Counsel ruled that EPA erred in denying STV an adjudicatory hearing, but refused to stay the permit or order EPA to conduct such a hearing.[1]

In September 1979, STV unsuccessfully moved in the court of appeals for a stay pending appeal, after which the parties submitted their briefs to the court on the merits. STV contended (1) that it was entitled to its adjudicatory hearing (a point LG&E contested); (2) that the EIS was facially invalid because of its reliance on the unenforceable stipulation, its failure to consider the facility's cumulative air pollution effects, and its reliance on excessively high demand projections; and (3) that the

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[1] STV expended 232 hours of attorney time through August 1979, together with more than 100 hours of law clerk time, and disbursements of $1,590.21, at a total cost of $31,576.25.

PSD permit had been issued in violation of the procedural requirements of the Clean Air Act.[2]

In July 1980, a month after oral argument, the court of appeals affirmed the procedural adequacy of the PSD permit and "adjourned" the proceeding in order to await the outcome of the adjudicatory hearing EPA had finally ordered in April 1980. The court required EPA to file monthly status reports on the progress of the adjudicatory hearings.

3. In the ensuing adjudicatory hearings, the administrative law judge (ALJ) ruled against STV on several issues but agreed with STV's contention that the EIS stipulation was unenforceable and did not provide the air quality and ground water quality protection assumed by the EIS. The ALJ found that:

> (1) EPA would not have issued the permit absent the stipulation, (2) EPA believed the stipulation to be a binding and enforceable commitment by LG&E, and (3) EPA relied on the stipulation as a means of mitigating certain potential unacceptable adverse environmental impacts.

ALJ Opinion at 19. In the face of EPA's belated admission that the stipulation was not enforceable, the ALJ observed:

> To now argue that no one really needed [the stipulation] in the first place simply will not wash. . . . It was used to allay public fears about potential adverse impacts. Either the EPA and LG&E knew at the outset that the stipulation was unenforceable and merely used it as a device to con the public or *they really felt it would cure future environmental problems with the project and was a necessary element of permit issuance.* The first if true is reprehensible

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[2] STV expended 253.75 hours of attorney time from September 1979 to March 1980, preparing briefs and for oral argument. The cost of this phase, with disbursements of $4,036.63, was $29,786.63.

> and the latter an honest mistake which nevertheless casts grave doubts on the adequacy of the EIS. (emphasis supplied).

Id. at 18-19. Based upon these findings, the ALJ ordered the terms of the stipulation incorporated into the NPDES permit. As a result, LG&E is now required pursuant to its permit (1) to keep a 30-day supply of low-sulfur coal on hand for use in the event any of the Trimble County facility's scrubbers fail for an extended period of time and (2) to undertake on-going monitoring for ground water pollution from the facility's scrubber sludge disposal pond. In the event such pollution is detected, the permit requires LG&E to take steps to dispose of its sludge in a safer fashion. Thus, these crucial environmental protection measures are now enforceable by EPA, affected states, and interested citizens.[3]

4. In its order of March 4, 1982, the court of appeals, upon STV's motion, affirmed the Administrator's decision to approve the modified permit. At the same time, the court denied EPA's and LG&E's joint motion for dismissal.

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[3] EPA and LG&E did not appeal the ALJ's order that the permit be modified. STV, however, challenged the deferential standard of review the ALJ had adopted and maintained that, under a proper, *i.e., de novo*, standard of review, the record would demonstrate that the EIS was further deficient by virtue of its failure to use the best modeling techniques in evaluating the Trimble County facility's air pollution impact, as well as its failure to take into account the most recent electricity demand data in determining whether the facility was really needed. The EPA Administrator agreed with STV that the ALJ had adopted an erroneous "arbitrary and capricious" standard of review, but went on to hold that the ALJ had in fact made a *de novo* review of the evidence. The Administrator therefore affirmed the ALJ's order, including that part of the order which modified the permit to make the provisions of the stipulation enforceable.

STV expended 202.25 hours of attorney time in oral argument to the court of appeals, and in presenting STV's case to the ALJ and the EPA Administrator. Together with $1,582.39 in disbursements, costs totaled $22,381.49 for this phase of the case.

On April 19, 1982, STV filed a detailed motion for costs and attorney's fees pursuant to the Clean Air Act, arguing that it had obtained important clean air results as a consequence of the litigation. The petition sought reimbursement for 850 hours of attorney time, an additional 156 hours spent by law clerks, and $7,438.23 in expenses, for a total of $97,925.28.[4] The petition excluded over 650 hours of additional attorney time spent on related matters, and sought no reimbursement for substantial additional attorney time spent in administrative proceedings prior to the filing of this action in January 1979.

On May 19, 1982, EPA filed its opposition to the fee petition, contending *inter alia* that since STV obtained its clean air relief in an NPDES permit, the Clean Water Act governed, and that fees must be denied because that statute had no provision for fees in this kind of litigation. EPA also attacked the amount of fees requested and the documentation supplied. STV replied on June 1, 1982, and moved for additional fees for the attorney time spent on that reply. EPA opposed that further motion on June 10, 1982, and STV replied on June 21.

On July 14, 1982, the court of appeals entered an order of denial, which stated in its entirety:

> Petitioner, Save The Valley, Inc. has moved this court to grant it attorney's fees and costs pursuant to section 307(f) of the Clean Air Act. 42 U.S.C. § 7607(f) (Supp. III, 1979). Upon the record before us, the motion is DENIED.

The court did not award costs to either side.

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[4] STV expended 158.25 hours of attorney time on this phase of the case, including the motion to affirm the NPDES permit. STV later expended 54.75 hours of additional attorney time in replying to EPA's May 19 and June 10, 1982 submissions. Thus, the total sought in attorney's fees and costs was $102,526.63.

REASONS FOR GRANTING THE PETITION

This case presents a key question in the proper construction of the Clean Air Act and other environmental statutes: namely, when a citizens suit is brought which results in tangible improvements in clean air protection, may all attorney's fees be denied? The court of appeals answered that question here by denying all fees. That answer conflicts with Congress' clear intent in enacting section 307(f) of the Clean Air Act, and with reported decisions by the Ninth, District of Columbia, and First Circuits, as well as the position taken by the United States in *Gorsuch* v. *Sierra Club*, No. 82-242, in which a petition for certiorari is now before this Court.[5] The Court should grant certiorari in this case to resolve this conflict among circuits and provide necessary guidance to the lower courts in administering the Clean Air Act and other environmental statutes.

1. STV brought this action under the Clean Air and Clean Water Acts and obtained two results for which fees should be awarded under section 307(f) of the Clean Air Act. First, STV has assured that LG&E will maintain a 30-day supply of low-sulfur coal for use during the inevitable breakdowns of the plant's scrubbers.

Second, STV has assured that if the disposal of scrubber sludge starts to pollute local ground water,[6] LG&E will change to a safer disposal method and move its disposal facility off the plant site. Congress intended that such side effects be considered and addressed in choosing

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[5] Manchester Environmental Coalition v. EPA, No. 82-247, another petition before the Court, also raises issues similar to those in this petition. The petitioner in that case seeks review of an unreported decision by the Court of Appeals for the Second Circuit.

[6] This area of Kentucky is known geologically as a karst region, with numerous sinkholes allowing polluted water rapidly to contaminate underground water supplies. Local residents and the nearby town of Bedford, Kentucky rely on wells in the immediate vicinity of the plant site for drinking water.

air pollution control standards and equipment for particular plants. Clean Air Act, §§ 165(e)(3)(B) (analysis of terrain and soils at plant site); 169(3) (consideration of other environmental effects in setting air pollution standards for plant); 42 U.S.C. §§ 7475(e)(3)(B), 7479(3) (Supp. III 1979). The legislative history of the 1977 Clean Air Act Amendments shows that scrubber sludge was one of the side effects Congress wanted addressed in setting standards for new power plants, both collectively and individually. H.R. Rep. No. 294, 95th Cong., 1st Sess. 190 (1977) *reprinted in* [1977] U.S. CODE, CONG. & AD. NEWS 1077, 1269 ("land disposal of sludge"); S. Rep. No. 127, 95th Cong., 1st Sess. 31 (1977) (condition PSD permit application to take other environmental effects into account).

Although these essential clean air protections were first proposed or considered for inclusion in the PSD and NPDES permits, EPA finally placed them in an obscure appendix to the EIS, making them unenforceable. As a result of this litigation, and over EPA's and LG&E's opposition, these protections now appear in an enforceable permit, a permit affirmed by the court of appeals on STV's motion.

Although the ALJ found that EPA had substantially erred in placing these essential permit conditions into the unenforceable stipulation, EPA argued to the court of appeals that STV's fee petition was governed by the form of permit modified and not by the substance of the relief obtained. That is, EPA argued that STV should be denied fees because this action was brought in part under the Clean Water Act which does not authorize attorney's fees for actions brought in the court of appeals. 33 U.S.C. § 1369 (1976 ed.).

EPA's argument, if allowed to stand, would severely undermine the attorney's fee and citizen suit provisions of the Clean Air Act and other environmental statutes governing the siting of industrial facilities such as power

plants. Construction of such installations normally requires several permits or approvals under environmental statutes. Some of these statutes, including section 307(f) of the Clean Air Act, provide for attorney's fees in subsequent litigation. Others, such as the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1976 ed.), do not. As a result, the Agency would be able to insulate itself from the attorney's fee provisions of the Clean Air Act in siting disputes by placing controversial clean air measures in a plant's NPDES permit or EIS.[7] Without the prospect of attorney's fees in subsequent litigation, meritorious suits under section 307 of the Clean Air Act will be strongly discouraged, contrary to Congress' intent in enacting section 307(f) in 1977. *See* Part 2, *infra*. EPA thus will have managed to erect an artificial barrier between the clean air measures it adopts for a controversial facility and persons who would seek review of those measures.

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[7] The potential difficulties arising from EPA's position are increased by EPA's consolidation of permit proceedings involving a particular installation. 40 C.F.R. §§ 122, 123, 124 (1981 ed.). EPA's opportunities to selectively place conditions in a permit other than the one to which they most logically relate and so to insulate itself from attorney's fees in later litigation are thus increased.

EPA's argument may also have undesirable side effects on the consolidated permit proceedings. These proceedings were intended to expedite siting decisions and to encourage the tradeoffs and bargaining necessary to settle siting disputes. *See* NATIONAL COMMISSION ON WATER QUALITY, STAFF DRAFT REPORT, at V-30 (1975) (water pollution control permitting a bargaining process). EPA has in fact used NPDES permits as a vehicle to make agreed tradeoffs enforceable. For example, in proposing the NPDES permit for a major new oil refinery at Eastport, Maine, EPA included conditions in the NPDES permit requiring special air quality and ground water quality monitoring. 9 ENV. REP. (BNA) 371, 372 (1978). These conditions are quite similar to those won by STV in this case. If EPA can deprive siting opponents of attorney's fees in subsequent litigation by shuffling permit conditions in this fashion, appropriate tradeoffs will become much harder to make.

EPA's argument for form over substance is also contrary to the teachings of this Court and others concerning attorney's fees in cases involving pendent claims.

It is well settled that where a party brings several different claims arising from "a common nucleus of operative fact," and prevails upon one of these claims, courts will award attorney's fees on the basis of one of the related claims. *Maher* v. *Gagne*, 448 U.S. 122, 131-33 (1980); *Seals* v. *Quarterly County Court of Madison County, Tennessee*, 562 F.2d 390 (6th Cir. 1977); *Church of Scientology* v. *Cazares*, 638 F.2d 1272, 1290-91 (5th Cir. 1981) (attorney's fees for entire case where Federal and pendent non-federal claims arise from same nucleus of operative fact); *Miller* v. *Carson*, 628 F.2d 346, 348 (5th Cir. 1980); *Lamphere* v. *Brown University*, 610 F.2d 46, 47 (1st Cir. 1979) (proper to award fees even where counsel unsuccessfully sought to broaden remedy); *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1979); *Kimbrough* v. *Arkansas Athletic Association*, 574 F.2d 423 (8th Cir. 1978). Thus the Court in *Maher* v. *Gagne* upheld the award of fees under the Civil Rights Attorney's Fee Award, 42 U.S.C. § 1988, where plaintiff prevailed on a Social Security Act claim pendent to the federal constitutional claim which she lost. 448 U.S. at 130-33.

This rule applies equally to environmental cases in which claims are brought under several statutes on the basis of the same facts. Thus, where plaintiffs combine environmental and civil rights claims, and prevail on their environmental claim, the courts have awarded fees under civil rights statutes. *Southeast Legal Defense Group* v. *Adams*, 657 F.2d 1118, 1124-25 (9th Cir. 1981) (intertwined civil rights and NEPA claims); *Keith* v. *Volpe*, 501 F. Supp. 403, 408 (C.D. Cal. 1980) (intertwined civil rights and NEPA claims). Likewise where, as here, plaintiffs have brought several environmental statutory claims on the basis of the same facts, the courts have awarded fees for all the work done even where some

of the statutes did not provide for fees, *Save Our Sound Fisheries Ass'n.* v. *Callaway*, 429 F. Supp. 1136, 1144 (D.R.I. 1977) (claims under NEPA, Clean Water Act, and Marine Protection, Research, and Sanctuaries Act).

These cases mandate an award of fees to STV under the Clean Air Act. The factual basis of STV's claims was EPA's legally insufficient assessment of the environmental effects associated with the Trimble County plant and, particularly, LG&E's choice of air pollution control technology for it. As discussed *supra*, most of the substantive issues raised before the court of appeals and the ALJ—the enforceability of the EIS air stipulation and the adequacy of EPA's air quality modeling—concerned air pollution. STV's procedural claims under the Clean Water and Clean Air Acts sought an opportunity to raise these substantive claims before construction was permitted to proceed. Over the initial opposition of EPA, and continuing opposition of LG&E, STV finally obtained the hearing it sought before the ALJ on its substantive clean air claims. The ALJ's decision provided virtually the same relief that inclusion of alternative coal supply and other requirements in the PSD air pollution permit would have.

EPA's argument in opposition to STV's fee petition, which the court of appeals apparently adopted, ignored the inextricable connections between the issues involved here. Furthermore STV raised its clean air claims in the context of a challenge to the adequacy of the EIS only because EPA elected to attempt to impose substantive air pollution control standards on LG&E through the totally inappropriate mechanism of an EIS stipulation.

Because of this strained and ultimately unlawful approach to air pollution control, the only forum in which the validity of the stipulation could be challenged was

the NPDES water pollution permit hearing. STV prevailed on this issue in that forum and obtained relief which is directly related to the mitigation of the facility's air pollution impacts. Under the circumstances, a fee award under the authority of the Clean Air Act is entirely justified.

2. Although STV obtained important clean air relief as a result of this litigation, the court of appeals denied all attorney's fees under the Clean Air Act, and did so without explanation. This decision is contrary to Congress' intent in enacting section 307(f), and contrary to the decisions by the Ninth and District of Columbia Circuits interpreting that statutory language. It also is contrary to the United States' argument in its petition for certiorari in *Gorsuch* v. *Sierra Club*, No. 82-242 (filed August 11, 1982), now before this Court.

Section 307(f) provides that:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

42 U.S.C. § 7607(f) (Supp. III 1979).

Congress added this subsection to the Act in 1977. The legislative history shows that Congress intended to encourage citizen suits by awarding fees not only where plaintiffs substantially prevail, but also in circumstances where plaintiffs obtain partial relief or otherwise further the purposes of the Clean Air Act. The House Report on the 1977 Amendments states:

> In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. *The Committee did not in-*

> *tend that the court's discretion be restricted to cases in which the party seeking fees was the 'prevailing party.' In fact, such an amendment was expressly rejected by the committee,* largely on the grounds set forth in NRDC v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973) (emphasis added).

H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* [1977] U.S. CODE, CONG. & AD. NEWS, 1077, 1416.

Congress drew the language of section 307(f) from section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (Supp. III 1979), which provides for fee awards in citizen suits brought in the district courts. The legislative history of section 304 also shows that Congress meant the fee provision to encourage litigation to assure proper implementation of the Clean Air Act. The Senate Report states:

> The courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. *This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict.* For instance, if as a result of a citizen proceeding and before a verdict is issued a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions. (emphasis supplied).

S. Rep. 1196, 91st Cong., 2d Sess. 38 (1970).

The court of appeals ignored this legislative history and denied attorney's fees, even though the practical result of this litigation is to protect residents around LG&E's Trimble County power plant from the risks of air and ground water quality degradation associated with LG&E's use of scrubbers. This kind of relief—protecting health and the environment—made this an "appropriate" case for fees under section 307(f) of the Clean Air Act. In-

deed, it is inappropriate that the court of appeals denied fees in a case which established, over EPA's and LG&E's objections, clean air protections now enforceable by citizen suit in district court,[8] where fees would clearly be awarded in any action to enforce these protections.

In denying fees the court of appeals ignored *Northern Plains Resources Council* v. *EPA* (*NPRC II*), 670 F.2d 847 (9th Cir. 1982), and *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982), *certiorari applied for*, No. 82-242 (August 11, 1982). These decisions interpreted section 307(f) to provide for attorney's fees even where plaintiffs lost on *all* issues, because these suits furthered the purposes of the Clean Air Act. The decision in *NPRC II* is directly in point here. In *Northern Plains Resources Council* v. *EPA* (*NPRC I*), 645 F.2d 1349 (9th Cir. 1981), NPRC challenged EPA's grant of prevention of significant deterioration (PSD) permits to two coal-fired power plants in Montana. That challenge, like STV's in this case, was filed under section 307 of the Clean Air Act. 42 U.S.C. § 7607 (Supp. III 1979). Like STV, NPRC challenged both the adequacy of the air pollution control equipment required by the PDS permits, *NPRC I*, *supra*, 645 F.2d at 1358-62, and the rationality of EPA's air quality modeling. *Id.* at 1362-65. The court rejected both claims.

Despite NPRC's loss on the merits, however, the court awarded fees under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. III 1979), holding that such an award was "appropriate" within the meaning of section 307(f), because Congress intended to encourage such challenges to PSD permits. *NPRC II*, 670 F.2d at

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[8] Such citizen suits may be brought and fees awarded under section 505(d) of the Clean Water Act. 33 U.S.C. § 1365(d) (1976 ed. & Supp. II 1978).

848. *See Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981) (losing plaintiff awarded fees in abatement case under section 304(d)). Without such fee awards members of citizens groups like NPRC (or STV) would not have sufficient incentive to undertake "the expenditures required by a suit of this type." *NPRC II*, 670 F.2d at 849. *See Florida Power & Light Co.* v. *Costle*, 683 F.2d 941, 942-43 (5th Cir. 1982) ("watchdog" groups need the financial incentive of fee awards in order to pursue section 307 suits).

Under the rationale of the Ninth and D.C. Circuits, STV presented an even stronger case for a fee award than did NPRC, because STV forced EPA to make the permit modifications necessary to assure that promised clean air protections were in fact enforceable by a citizen suit, the states, and EPA. This result is clearly the kind Congress intended to encourage by adding the fee provision.

The court of appeals also ignored decisions construing identical language in section 304(d) of the Clean Air Act and in other environmental statutes to provide for fees to partially prevailing or unsuccessful plaintiffs. *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981) (fee award to unsuccessful plaintiff in abatement action under section 304(d)); *Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) (fee award under section 304(d) to partially prevailing plaintiff); *Environmental Defense Fund* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982) (partially prevailing under the Toxic Substances Control Act).

Finally, the court of appeals' decision is contrary to the position the United States now takes in petitioning this

Court for certiorari in *Gorsuch* v. *Sierra Club*, No. 82-242 (filed August 11, 1982).

> It is clear that Congress intended to hold the government liable for attorney's fees in actions that spur proper implementation of the Act by correcting administrative errors. . . .
>
> The government agrees that success on the merits, in the traditional sense of a favorable final judgment, is not a prerequisite for an award of fees under the statute. Nevertheless Section 307(f)'s legislative history clearly indicates that some tangible accomplishment is a prerequisite to eligibility for a fee award under the statute.

United States Petition for Certiorari at 9, 16.[9] As the United States further observed, unless courts reward "litigants who actually aid Agency implementation of the Clean Air Act by correcting administrative errors," there will not be "sufficient incentive for the citizen involvement" Congress intended. *Id.* at 12.

Thus under the United States' own "tangible accomplishment" standard, STV should be awarded attorney's fees, because it obtained tangible clean air relief as a result of this protracted litigation. Unless STV's efforts here are rewarded, STV and citizens groups like it will be strongly discouraged from invoking "judicial review to put the Agency back on course . . . when it missteps." *Id.* That is especially true here, where STV has followed the disputed permits through multiple administrative and judicial proceedings, beginning in 1975 and continuing until 1982.

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[9] Opponents of attorney's fees evidently agree with the United States that the Clean Air Act does not apply a "prevailing party" standard for they have sought to write such language into pending Clean Air Act Amendments. 13 ENV. REP. (BNA) 492, 549 (1982).

3. The court of appeals denied STV's application for costs and fees without explanation. Unlike the normal situation where the court of appeals reviews the district court's findings and conclusions concerning fees, the court of appeals was acting as the trier of fact on this fee application. It is well established that it is an abuse of discretion to deny attorney's fees without explanation. *Commissioner's Court of Medina County, Texas* v. *United States*, 683 F.2d 435, 439 (D.C. Cir. 1982); *Murphy* v. *Kolovitz*, 635 F.2d 662, 664 (7th Cir. 1981); *Hameed* v. *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396*, 637 F.2d 506 (8th Cir. 1980); *Sethy* v. *Alameda County Water District*, 602 F.2d 894, 897 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); *Sargeant* v. *Sharp*, 579 F.2d 645, 647 (1st Cir. 1978).

The reasons for this rule are evident: it is impossible for this Court to determine if the court acted properly in deciding a fee application unless the court articulates some reasoned basis for its decision.

The court of appeals' failure to do so in this case forces STV and this Court to guess at reasons for the denial of fees. This exercise is made all the more difficult by the inconsistency of this denial with the reported fee decisions under the Clean Air Act, with the EPA's position before this Court in *Sierra Club* v. *Gorsuch*, No. 82-242, and with the court of appeals' action in awarding costs in this action to neither side.

Unless the court of appeals is required to state its reasons, Congress' purpose is enacting section 307(f) may be easily circumvented simply by denying fees without explanation, and the Clean Air Act will become harder to implement properly.

CONCLUSION

The petition for a writ of certiorari should be granted in order to provide the lower courts guidance in construing the citizen suit provisions of the Clean Air Act and other environmental statutes, and to resolve the conflict among the circuits.

Respectfully submitted,

JOHN L. OBERDORFER
J. GORDON ARBUCKLE
DUANE A. SILER
RUSSELL V. RANDLE
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Attorneys for Petitioner
Save The Valley, Inc.

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